

BEFORE THE OFFICE OF THE COMMISSIONER OF RAILROADS

STATE OF WISCONSIN

In the Matter of the:

Petition of the Wisconsin Department of Transportation for the Establishment of a Public Crossing of the Wisconsin & Southern Railroad, LLC Tracks with Wagon Trail Pathway in the City of Madison, Dane County

9170-RX-316

**NOTICE OF RESCHEDULED HEARING and
PREHEARING CONFERENCE MEMORANDUM**

NOTICE IS GIVEN that the hearing originally scheduled in this docket for **Tuesday, March 22, 2016**, in the Amnicon Falls Hearing Room at the Public Service Commission Building, 610 North Whitney Way, Madison, Wisconsin, is **RESCHEDULED** for **Wednesday, May 4, 2016, at 10:30 am**, and continuing at times to be set by the presiding Administrative Law Judge. A separate Notice of Hearing will be issued at a later date.

This memorandum **ORDERS** the following consistent with the prehearing conference held in Madison, Wisconsin, on March 11, 2016.

I. PARTIES

The Wisconsin Department of Transportation (Petitioner), the city of Madison, and Wisconsin & Southern Railroad, LLC, are the only parties in this docket.

II. ISSUES

1. Would establishment of the Wagon Trail Pathway crossing promote public safety and convenience?
2. Whether establishment of the crossing would be advisable under all the circumstances.
3. What warning devices would be necessary to adequately protect and promote public safety?
4. How shall the costs of the crossing construction be apportioned?

III. SCHEDULE

- | | |
|--|---|
| • Friday, March 18, 2016, at 12:00 noon. | Petitioner and City of Madison
Direct testimony and exhibits |
| • Friday, April 15, 2016, at 12:00 noon | Rebuttal testimony and exhibits |
| • Friday, April 29, 2016, at 12:00 noon | Surrebuttal testimony and exhibits |
| • Wednesday, May 4, 2016, at 10:30 a.m. | Public and party hearing session |

IV. Other Facilitating Matters

Other matters required to facilitate this proceeding as they appear in the attached Guidelines for Contested Case Proceedings are incorporated into this Order.

Dated at Madison, Wisconsin, March 11, 2016.

By the Office of the Commissioner of Railroads.

A handwritten signature in black ink, appearing to read "David Albino", with a long horizontal flourish extending to the right.

David Albino
Administrative Law Judge

DA:jg:DL: 01301930

Guidelines for Contested Cases

A. General

1. The Office of the Commissioner of Railroads (Office) provides the following guidelines to inform practitioners and the public alike of practice before the Office in contested cases, or those treated as contested case proceedings. These guidelines become binding procedures for a particular docket when ordered by the presiding Administrative Law Judge (ALJ). The presiding ALJ may adopt these guidelines in whole, in part, or modify these guidelines as necessary to facilitate processing a particular docket.

2. The Case Coordinator is the first point of contact for a party on any procedural matter related to the docket.

B. Documents – Filing, and Service, Formatting, Numbering.

1. Filing and Service

a. The Office shall receive only Portable Document Format ("pdf") files for the record. Documents shall contain no attachments or embedded files.

b. File any document by uploading to the Public Service Commission's Electronic Records Filing System ("ERF") (http://psc.wi.gov/apps40/ERF_public/Default.aspx). If ERF does not accept a document, contact the Records Management Unit at (608) 261-8521, for assistance.

c. ERF upload requires the assignment of a "Document Type." Choose the "Document Type" that best corresponds with the substance of the document from the following:

- (1). Application
- (2). Brief
- (3). Comments
- (4). Correspondence
- (5). Data Request/Response
- (6). Exhibit - Offered
- (7). Motion
- (8). Petition (includes Complaint)
- (9). Request for Intervenor / Party Status
- (10). Testimony - Offered

d. ERF upload requires a document "Description." Be concise when doing so.

e. ERF Filing constitutes service. See Wis. Admin. Code § RR 1.01(2).

f. Parties and Office staff shall serve all filings by e-mail. But, if size, format, or the protection from public release of information filed under request for confidential handling prevents e-mail service, serve by physical delivery on a standard optical disc storage media.

g. Parties and Office staff shall inform each other of any e-mail address and one physical address to which the requirements of service shall apply.

h. Serve the Office docket coordinator any, but, unless otherwise required, file no party to all-party correspondence.

i. In computing any period of time that follows service, the day of e-mailing is the day of mailing. This applies regardless of any dated signature or ERF filing date stamp.

2. Confidentiality

a. To protect a record submitted in the course of a proceeding from public disclosure, parties may request that the ALJ order such protective measures as are necessary to protect the trade secrets of parties, as defined in Wis. Stat. § 134.90(1)(c).. Wis. Stat. § 227.46(7)(a).

b. The Office shall hear in camera any oral testimony and cross-examination that may include information subject to a claim for confidential handling. The Office shall handle the transcript volume for such hearing as confidential to the extent necessary.

3. Written Testimony

a. Contents-

(1). Parties produce written testimony in lieu of oral testimony at hearing.

(2). Rounds of written testimony, when scheduled, are defined as:

(a). Direct (first round of testimony), provides each party the opportunity to present its positions and produce evidence to prove the facts needed to support its claims.

(b). Rebuttal (second round of testimony), provides each party the opportunity to present responsive and countervailing evidence (but no new issues) to that presented in direct.

(c). Surrebuttal (third round of testimony), provides each party the opportunity to present responsive and countervailing evidence (but no new issues) to that presented in rebuttal.

(3). Testimony that supplements the contents of testimony the witness already filed, requires a request for leave to file. Submit the request simultaneously, but separately, from the supplement.

(4). Failure to rebut or surrebut the testimony of another witness does not imply consent to that testimony. A witness must expressly recant any prior testimony. So a witness need not repeat or restate prior testimony to retain its position on any matter.

(5). The testimony of another witness speaks for itself. So a witness should refer to the testimony offered by another witness by citation rather than restating it, whenever possible.

(6). Only documentary evidence expressly offered for and duly received as an exhibit will come before the Office. Therefore, testimony shall only direct the Office to documents offered as exhibits or for which the ALJ may take administrative notice. Testimony may include citations (including PSC REF#s) to documents not offered as exhibits, but only for the purpose of identifying the source of facts asserted, so that the fact asserted maybe verified by other parties and Office staff.

b. Format-

(1). Separate the testimony from any:

(a). Exhibit being offered with the testimony.

- (b). Cover letter
- (c). Request for an order.
- (2). Do not include a cover page.
- (3). Allow space at the top right corner for the PSC REF# stamp.
- (4). Structure testimony in question and answer format.
- (5). Use line numbering.
 - (a). File according to established deadlines.
 - (b). When filing:
 - i. Use the ERF Document Type: "Testimony-Offered."
 - ii. For ERF Document Description, use "[round of testimony]-[party]-[witness], i.e., "Direct-DOT-Smith".
- (6). Number each page at center bottom starting with "1" according to the following convention: "[round of testimony]-[party]-[witness]-[page #]", i.e., ("Direct-DOT-Smith-1")
- (7). If the testimony offered in the filing supplements a round of testimony already filed; add "s" to the end of the page number: ("Direct-DOT-Smith-1-s")
- (8). Include no live Internet hyperlinks.
- (9). Cite to any existing prehearing testimony in the docket by the assigned page or exhibit number. Include no PSC REF #s. i.e., "As mentioned in Direct-DOT-Smith-15 ...".
- (10). Cite to any existing offered exhibit in this docket by the exhibit number. Include no PSC REF #s. ("I prepared Ex.-DOT-Smith-1...")
- (11). Refrain from pinpoint line number citation because refiling of the source document may render the citation stale.

c. Corrections-

- (1). Identify in an errata sheet, any corrections to testimony prior to hearing.
- (2). After the hearing, refile such testimony that requires corrections as provided in the post hearing process below.
- (3). If the filing corrects or replaces a prior filing add "r" to the end of the page number: ("Direct-DOT-Smith-1-r")
- (4). Add "r" to the end of ERF Document Description: ("Direct-DOT-Smith-r")

4. Exhibits

a. Contents-

- (1). Only documentary evidence expressly offered for and duly received on the record as an exhibit will come before the Office.
- (2). Offer documentary evidence by filing:

- (a). All documents, except for those already filed as exhibits in this docket.
- (b). Introduce the documents in written testimony, affidavit, or at hearing.
- (c). If only the portion of the document relates to the purpose of its introduction, offer only the title page and that part of the document.

- (3). To offer any document already filed on ERF in this docket requires refiling the document as an exhibit.
- (4). To offer any evidence already filed on ERF in another docket requires refiling, as an exhibit, the final version previously verified by the original sponsor.
- (5). To offer a docket Petition for the record, follow the format guidelines below. A Petition would normally be marked as "Ex.-[party]-[witness]-[exhibit #]", i.e., "Ex.-DOT-Smith-1". Mark all attachments to the Petition as "Ex.-DOT-Smith-1-1", "Ex.-DOT-Smith-1-2", etc. Each exhibit should be filed separately on ERF.

b. Format-

- (1). Separate exhibits from any:
 - (a). Testimony
 - (b). Cover letter
 - (c). Request for an order
- (2). Use a cover page with Docket Number, Exhibit Number, and Date in three separate lines at top right corner.
- (3). Allow two inches of space at top and right corner of the cover page for the PSC REF# stamp and date received stamp.
- (4). Mark the exhibit at the center bottom of the cover page as "Ex.-[party]-[witness]-[exhibit #]", i.e., "Ex.-DOT-Smith-1"
- (5). Begin at # 1 and continue in numerical order for that witness throughout the proceeding.
- (6). If the filing is filed under a request for confidential handling; add "c" to the end of the page number: ("Direct-DOT-Smith-1-c")
- (7). If the filing is a redacted public version of a document filed under a request for confidential handling; add "p" at end of the page number: ("Direct-DOT-Smith-1-p")
- (8). File according to established deadlines.
- (9). When filing:
 - (a). Use the ERF Document Type: "Exhibit-Offered"
 - (b). Use the exhibit marking as the ERF Document Description, i.e., "Ex.-DOT-Smith-1".

c. Corrections-

(1). Any change to an exhibit requires refileing a complete replacement version. Indicate an exhibit is a replacement by adding "r" to the end of the exhibit number: ("Direct-DOT-Smith-1-r")

(2). Add "r" to the ERF Document Description: ("Direct-DOT-Smith-r")

5. Requests for an Order/Briefs

a. **Contents-**For any post-hearing brief on the merits, cite only evidence and testimony of record

b. Format-

- (1). Include no cover page
- (2). Allow space at the top right corner of the first page for the PSC REF# stamp.
- (3). Use 12 point double-spaced type and one-inch margins
- (4). Limit the number of pages to 30 pages for initial post-hearing brief on the merits; and to 15 pages for all other briefs.

c. Filing-

- (1). File any request for an order using the "Motion" document type even if a brief is attached.
- (2). File any brief, response, or reply using the "Motion" document type.

d. **Corrections-** Any change to a request or brief requires refileing a complete replacement version. Indicate a brief is a replacement by adding "(revised)" to the title and ERF Document Description ("Request for Leave (revised)")

C. Motion Practice. For all requests for an order, including objections, made prior to a decision on the subject matter of the request:

1. Direct the request to the Administrative Law Judge.
2. File the request, unless timely made at a hearing.
3. When filing the request, use the "Motion" document type.
4. The following schedule shall apply to any filed requests:
 - a. Respond by 1:30 p.m., three days after the filing of the request.
 - b. Reply by 1:30 p.m., two days after the filing of the response.
5. File a response or reply using the "Motion" document type.
6. Any request that contains a representation or certification of the consent of the parties and Office staff shall take effect immediately upon filing, but shall receive reconsideration if so ordered within three days after filing of the request.

7. Any request to which a response is authorized, but not received, shall take effect immediately after the response deadline, but shall receive reconsideration if so ordered within three days after the response deadline.

D. ALJ Communications and Orders

1. If sending an e-mail to the ALJ, copy all other parties unless otherwise required.
2. Written orders of the ALJ shall be served by email.
3. In computing any period of time that follows the issuance of an order of the ALJ, the date of the ERF filing date stamp is the date of mailing.

E. Pre-Hearing Procedures

1. Discovery

(a). File any response to a party discovery request or Office staff data request as information becomes available. For any request made prior to the deadline to file rebuttal testimony, respond in full no later than 21 days after service of the request, with an exception of 30 days allowed for just cause. For any request made in response to rebuttal testimony respond in full no later than seven days after service of the request. For any request made in response to surrebuttal testimony respond in full no later than two days after service of the request.

(b). Notify a requester of the intent to answer a discovery request or data request solely by objection, or by objection and partial response, notwithstanding the objection, within three days after service of the request. For any request made in response to rebuttal testimony serve the notice two days after service of the request. For any request made in response to surrebuttal testimony serve the notice within one day after service of the request.

(c). File any request to compel a response to a discovery request or data request. File the request by 1:30 p.m. three days after receipt of a notice to answer solely by objection. File the request by 1:30 p.m. three days after receipt of an answer by objection and partial response, notwithstanding the objection.

(d). File a request for protective order to a discovery request or data request.

(e). Serve any, but do not file party discovery requests or notices to object, with the Office staff docket coordinator.

2. Hearing Preparation

(a). Offer any written testimony and exhibits by filing by the deadline provided.

(b). To request to change the schedule in this proceeding, file a request to modify the Prehearing Conference Order for good cause.

(c). Follow all format requirements for written testimony and exhibits provided herein.

(d). Request leave to file supplemental written testimony or exhibits. File the supplement concurrently, but separate from the request.

(e). Object to prehearing testimony and exhibits by the deadline of the next round of filing.

(f). Any party who compels a witness to appear at hearing shall create a volume of written testimony for that witness in the form of either a deposition or interrogatory. File the

volume of written testimony for any witness being compelled to appear, and corresponding exhibits, by the deadline to file rebuttal testimony.

(g). The Petitioner shall make an adequate number of personnel with knowledge of the issues in this docket available at each public hearing session to answer questions from members of the public.

(h). A party shall endeavor to identify its employees or members filing written comments or participating at the public hearing session in support of that party's position and shall use best efforts to organize the testimony of such witnesses in a manner that avoids undue repetition.

(i). Attempt to obtain consent under Wis. Stat. § 807.13 in sufficient time to plan an in-person witness appearance, if necessary.

(j). File all corrections to prehearing testimony and exhibits by one day prior to the party hearing session. Timely filed corrections require no request or pre-approval from the ALJ, but such corrections are subject to objection at hearing.

(k). E-mail the ALJ and copy the parties and Office staff by 1:30 p.m. one day prior to the first day of the party hearing session to:

- (1). Request to take a witness at a specific prearranged time.
- (2). Identify the witnesses that a party intends to cross-examine. This does not waive the right to cross-examine other witnesses.
- (3). Identify any need to conduct a portion of the hearing in camera.
- (4). Identify any witness appearing by telephone.
- (5). Request the scheduling of additional hearing time.

F. Hearing Procedures

1. Before the call of witnesses, the ALJ may:
 - (a). Hear any corrections to the Pre-Hearing Written Testimony and Exhibit List.
 - (b). Hear any remaining corrections to prehearing written testimony and exhibits.
 - (c). Rule on pending and allowable objections.
 - (d). Hear oral arguments in lieu of briefs with respect to any pending motion for which the deadline to file briefs would not expire prior to, or on, that day.
 - (e). Receive into the record all items on the previously issued Pre-Hearing Written Testimony and Exhibit List, subject to any verification by the witness, pending or allowable objections, and corrections to the list.
2. The sponsor of any prehearing testimony or exhibit not received into the record may make such filings an offer of proof.
3. The sponsor of any oral testimony not received into the record may make a brief oral offer of proof.
4. The order of appearances and cross-examination by parties shall start with the Petitioner or Complainant, railroad and municipality. Parties may arrange the order of own witnesses.

5. Witnesses may appear by telephone if good cause exists under Wis. Stat. § 807.13.
6. Prior to cross-examination, any witness may offer brief oral testimony that responds only to the last round of prehearing testimony or any subsequent testimony of another witness received at the hearing. Use best efforts in this matter to avoid undue surprise or prejudice.
7. Limit cross-examination of a witness by the length and scope required to reasonably investigate matters with respect to the testimony of that witness. To investigate beyond these parameters requires the party to have followed the applicable prehearing process for compelling the witness to appear at hearing for direct examination.
8. Provide an adequate number of copies of any document referred to during the hearing, but not previously filed.
9. Hearings in Madison are normally webcast. Therefore, the Office will make no phone lines available to monitor a hearing.

G. Post-Hearing Procedures

1. File any document not filed prior to the party hearing session but offered and received at the party hearing session by 1:30 p.m. three days after the last day of the party hearing session.
2. File documentary evidence not previously filed but identified at the party hearing session and for which offer into the record is delayed until after the party hearing session by 1:30 p.m. three days after the last day of the party hearing session.
3. File the affidavit of any witness attesting to the truthfulness and accuracy of that witness's written testimony and exhibits offered into the record in the absence of a live oath or affirmation by 1:30 p.m. three days after the last day of the party hearing session.
4. File a complete replacement version of any written testimony or exhibit corrected by errata or at the hearing, by 1:30 p.m. three days after the last day of the party hearing session.
5. If using a court reporter in preparing a hearing transcript, the opportunity to offer hearing transcript corrections is as follows:
 - (a). By the established transcript turnaround time, the court reporter shall serve a draft transcript.
 - (b). File any proposed corrections to the draft transcript in the form of an errata sheet by 1:30 p.m. three days after service of the draft transcript.
 - (c). An errata may correct a misstatement when necessary to convey the truth, and if the change causes no prejudice.
 - (d). Propose a clarification to eliminate confusion, without prejudicially changing meaning.
 - (e). File any objection to a proposed transcript correction by 1:30 p.m. two days after the filing of the proposed correction.
 - (f). Any timely filed objection shall stand unless overruled by the ALJ within three days after filing of the objection.
 - (g). Office staff shall serve, and send to the court reporter, all corrections timely filed, unopposed and allowed over objection.

(h). The court reporter shall create the official version of the transcript by making the corrections provided by Office staff. The court reporter shall serve the official transcript only to Office staff.

(i). Office staff shall file all official transcript volumes and serve only the official version of any in-camera hearing transcript volume.

6. Object to, or request to offer rebuttal or countervailing evidence for any evidence offered by a member of the public by 1:30 p.m. two days after service of the transcript of the public hearing session.

7. Request leave to present additional evidence under Wis. Stat. § 227.56(1), or request to take official notice under Wis. Stat. § 227.45(3). Simultaneously, but separately, file the evidence at issue verified by affidavit.

8. A non-party shall offer a brief on the merits by filing simultaneously with, but separately from the brief, a request for leave to file.

9. Respond to a notice by the Office of its decision to avail itself of any evidence in its possession under Wis. Stat. § 227.45(2) by 1:30 p.m. three days after the notice issues. Simultaneously, but separately, file any rebuttal or countervailing evidence verified by affidavit. Reply by 1:30 p.m. two days after the filing of the response.

10. A request for an order filed after the hearing does not stay the issuance of a proposed final decision.

H. Post Decision Procedures

1. File any request for rehearing or reopening under Wis. Stat. §§ 196.39 or 227.49.

(a). File a request using the "Petition" document type.

(b). Respond by 1:30 p.m. five days after the filing of the request.

(c). File a response using the "Petition" document type.

2. The record on review under Wis. Stat. § 227.55 shall contain any offer of proof. But, no offer of proof shall enter the evidentiary record unless the Office or a court overturns the ruling to exclude the evidence and provides an opportunity for cross-examination or the offer of countervailing evidence.

3. When a proposed final decision is prepared and circulated, comments shall be filed within 15 days of the date of the proposed final decision unless a different date is specified by the ALJ. Comments shall be filed on ERF.

4. Requests for oral argument by parties shall be filed prior to preparation and circulation of the proposed decision. Oral argument shall be held only where directed by the commissioner.